UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

McDONALD'S USA, LLC, A JOINT EMPLOYER et al., and	**Cases 02-CA-093893, et al.**
	04-CA-125567, et al.
	13-CA-106490, et al.
FAST FOOD WORKERS COMMITTEE AND	**20-CA-132103, el al.**
SERVICE EMPLOYEES INTERNATIONAL	**25-CA-114819, et al.**
UNION, CTW, CLC, et al.	**31-CA-127447, et al.**

CERTAIN REGION 13 AND REGION 25 FRANCHISEES' PAPERS IN SUPPORT OF SPECIAL APPEAL FROM THE ALJ'S ORDER DENYING MOTION TO APPROVE SETTLEMENT AGREEMENTS

Dated: August 24, 2018

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TABLE OF CONTENTS

Page

We represent certain individual franchisees in Region 13 (Chicago) and Region 25 (Indianapolis)[1] and write in support of McDonald's USA's Request for Special Permission and Special Appeal to ALJ Esposito's decision to deny the agreed-upon settlement. As set forth in detail in McDonald's and the General Counsel's Special Appeal papers, the ALJ applied a tortured version of *Independent Stave* in an attempt to justify denial of the settlement. Franchisee Respondents join in those arguments made by McDonald's and the General Counsel, and further address this denial from the perspective of individual franchisees who needlessly remain stuck in the quagmire of this ill-conceived litigation, despite offering full relief to the alleged discriminatees.

Put simply, this case and the impact on my clients, is the most severe case of governmental abuse and waste I have witnessed in my forty years of practicing labor law. Our clients should not continue to be punished for previous decision-making that resulted in a structurally flawed and unprecedented consolidated case.

Putting this aside for the moment, we focus on our clients. Specifically, their backgrounds, the very minor alleged violations they are accused of, and the proposed full remedies that have been offered to all alleged discriminatees. On this basis alone – the fact that this settlement agreement fully vindicates the rights of the alleged

[1] Specifically, we represent RMC Enterprises LLC, RMC Loop Enterprises, Lofton & Lofton Management V, Inc., Wright Management, Inc., Nornat, Inc., and Faith Corporation of Indianapolis.

discriminatees, and therefore fulfills the purpose of the NLRA, there is no legitimate basis to contend that the settlement terms are unreasonable.

A. Franchisee Respondents Alleged Violations and Proposed Remedies

Our clients are not multi-national companies. They are individual franchisees and business owners who have worked tirelessly to stay afloat in an industry where razor-thin margins are an everyday reality. These clients include the Wright family, immigrants from Croatia who put every dollar they had into their first McDonald's and were able to turn a McDonald's located in a notoriously dangerous area of Chicago into a success.

These clients also include the husband and wife team of Ron and Lillian Lofton. Ron Lofton was raised in the 50's and 60's by his grandparents, sharecroppers in Mississippi. Mr. Lofton became the first in his family to graduate from college, and he has focused his efforts on providing similar educational opportunities for inner-city teens in Chicago. He rose to become the owner of five McDonald's restaurants and the President of the Black McDonald's Operators Association of Chicagoland before recently retiring, in part, due to the unnecessary stress and abuse caused by this proceeding.

Our other clients have similar stories -- they are small business owners that have all been ignored and unnecessarily held hostage by the previous General Counsel's

effort to overturn the well-established standards for joint employment in the fast-food industry.

The case of the Loftons, who have been involved in this case since 2013, highlights the depths of this unjustifiable prosecution. The sole reason that the Loftons remain in this case is the schedule that is attached as **Exhibit A**. This work schedule was posted in the break room at the Loftons' store on 23 N. Western Avenue, and it contained the following disclaimer on the bottom:

> The material contained herein is the confidential property of McDonald's Corporation. Any use, copying or reproduction of this material, without the prior written permission of an Officer of McDonald's is prohibited and may lead to civil and criminal prosecution.

This boilerplate disclaimer is the reason – **the only reason** – the Loftons must continue to drain resources and time with this never-ending litigation. The charge claims the disclaimer would cause employees to believe they could not discuss their work schedules, and therefore, unlawfully restricted employees in their right to engage in protected activity. There is no claim that the provision was ever enforced and the charge ignores evidence that employees at the store regularly discussed their schedules with each other. Additionally, shortly after the unfair labor practice charge was filed back in 2013, the Loftons revised the disclaimer to further clarify that this provision in no way impacts employees' rights to engage in protected activity and/or to discuss their schedules.

This is what the Loftons are accused of – there is no charge of unlawful discipline, termination, or any other allegation of wrongdoing. The only reason the Loftons remain in this already five-year old case is a disclaimer that was never enforced; that was revised over three years ago; and that would likely be considered lawful under the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017).

Nonetheless, since 2013, the Loftons have been required to respond to a massive 68-paragraph subpoena for electronic and paper documents that had nothing to do with the unfair labor practice charge against them. Subpoena attached as **Exhibit B.** Instead, the subpoena was a fishing expedition relating to the previous General Counsel's desire to establish McDonald's Corporation as a joint employer with its franchisees.

In addition, based on the convoluted severance of this proceeding, the Loftons will be required to submit written objections to the transcript in the current Region 2 and 4 proceedings if this case is allowed to go forward. This transcript is likely to exceed 30,000 pages and 3,000 exhibits and none of this testimony relates to the alleged unlawful activity of the Loftons. Instead it relates to the alleged joint employer status of McDonald's and its franchisees. After the objection process is complete, the Loftons will then have to wait until a decision is reached by the ALJ and the NLRB in the Region 2 and 4 proceedings. Only after the NLRB issues its decision, which is likely to be at least seven to eight years away, would a hearing be scheduled regarding the alleged

unfair labor practices against the Loftons and the other Chicago and Indianapolis franchisees we represent.

Including appeals, this case could realistically last into the 2030's. Over fifteen years of litigation, all for a disclaimer on a work schedule that was never enforced, that has already been revised, and is likely lawful under current Board precedent.

As for our other clients, the misconduct alleged is similarly minor, with the potential, cumulative damages ranging somewhere between $5,000 - $15,000. Specifically, the misconduct alleged includes:

(i) RMC Enterprises using the same allegedly unlawful disclaimer on their schedule as the Loftons;

(ii) Nornat engaging in NLRA-prohibited "surveillance and video-recording" and making a threat of futility to employees in December 2013;

(iii) RMC Loop threatening an employee with termination and reducing his work hours in February and March 2013 if he tried to organize his co-workers or "did not stop talking to other employees about a Union";

(iv) Wright Management threatening two employees with discipline for engaging in NLRA-protected activity and unlawfully denying

another employee's one-time request to switch shifts with another employee; and

(v) Faith Corporation's owner "staring menacingly" at an employee and union organizer through a restaurant window, and cutting the work hours of an employee engaged in NLRA protected activity.[2]

As noted, we have offered to settle these cases for full and total relief to the discriminatees in order to put an end to this litigation. The alleged victims in this case are the employees that had their rights violated, it is not the Charging Party SEIU, and every single one of those individuals will be vindicated through this settlement.

Vindicating employee rights is the very heart and purpose of the National Labor Relations Act. The unfair labor practices at issue here are for violations of employee rights. It is not unlawful to be a joint employer and as explained by McDonald's and the current General Counsel, all employee rights will be fully remedied by this settlement.

[2] This employee, before being hired by Faith Corporation's owner, Reginald Jones, was living in his car in the McDonald's parking lot. Mr. Jones did not call the police to have him removed from the premises. Instead, Mr. Jones helped the man into a homeless shelter and gave him job at his restaurant. Interestingly, this same employee recently approached Mr. Jones to ask him if he could settle this case because the Charging Party told him that nothing was going to happen for several years, and that in his frank opinion, "the Union ain't doing [nothing] for me." In addition, the fact that the previous General Counsel's complaint is focused on an individual allegedly "staring menacingly" epitomizes the absurd nature of this litigation.

The NLRA's unfair labor practice procedures do not exist to assist the SEIU (by the NLRB acting as its litigation arm) in achieving its long-term goal of expanding the joint-employer definition to provide them with the opportunity to organize franchisors on a corporate-level. However, if the SEIU would like to test their joint employer theory, the NLRB's representation case procedures provide them with that opportunity and they could actually attempt to organize employees. This unfair labor practice case is not the proper forum for achieving the SEIU's political goal, and the ALJ's continued aiding of the SEIU in its ultimate goal is inappropriate, and a waste of time and resources.

There is no legitimate reason why the franchisee respondents should not be allowed to settle these unfair labor practice charges as they would any other unfair labor practice charge before the NLRB, and the denial of this settlement is indefensible.

B. <u>Timeline for Completion of this Proceeding</u>

In evaluating the timeline for completion of this case, ALJ Esposito writes "General Counsel's decision to pursue a settlement, and accept the Settlement Agreements discussed above, literally days before the close of the monumental record in this case is simply baffling." (ALJ Decision p. 37).

However, this statement refuses to recognize that this case will not be "complete" for well over ten years. As set forth above, each of our clients will be forced to endure at least ten more years of litigation if this case is not settled, and the ALJ and

previous General Counsel's failure to acknowledge the unjustifiable burden on our clients is frustrating and disappointing, particularly in light of the minor violations alleged.

Significantly, when the ALJ realized that she had erred by consolidating this case (as explained in detail below), there was no recognition of error or opportunity given to the harmed parties to recoup costs based on this mistake, but instead, further blame cast unfairly on the parties. This conduct by a governmental body is what has been baffling to our clients. What is not baffling is that the parties would choose to settle by offering full relief to the alleged discriminatees rather than continue with another decade of abusive litigation that, at the end, would provide nothing beyond what is being offered to the discriminatees in this settlement.

C. ALJ Esposito Admits Her Mistake In Consolidating the Case on the 58th Day of Trial

Throughout the denial decision, ALJ Esposito expresses frustration that a number of her decisions were appealed to the Board, almost all of which included a strong dissent from Chairman Miscimarra. This expression of frustration undermines the appeal process and should have had no place in the *Independent Stave* analysis. In fact, we regret the need to address it here.

However, ALJ Esposito's retelling of this litigation ignores the ALJ's significant change of course halfway through the litigation. Specifically, on the 58th day of trial in this proceeding, ALJ Esposito finally conceded the obvious, "hearing all of the

consolidated cases together is impossible," and concluded that if "the evidence is heard with the cases as currently consolidated, the record will not close for years, and a definitive agency ruling with respect to joint employer status will not be made until well into the next decade." *See McDonald's USA, LLC*, 364 NLRB No. 144, fn. 4 (2016).

As a result, on October 12, 2016, ALJ Esposito issued an Order severing all of the consolidated cases except for the Region 2 (New York) and Region 4 (Philadelphia) unfair labor practice cases. *Severance Order and Stipulation* (attached as **Exhibit C)**. Pursuant to this Order, all of the severed cases are to be held abeyance until the Board issues a decision in the Region 2 and 4 cases. *Id*. In addition, as set forth above, the Order still requires the Franchisee Respondents to submit deferred objections for a hearing it did not attend (raising significant due process concerns), requiring them to review over 30,000 pages of transcript at the close of the Region 2 and 4 proceeding.

As noted, while typically, we would not find it necessary to address the ALJ's change of course and admitted mistake, the ALJ's settlement decision faults the parties for challenging her decisions, particularly those relating to consolidation and the structure of the case. Ultimately, the Board should view the parties' challenges to the ALJ's decisions as the ALJ should have—irrelevant and consistent with the Respondents' obligations to represent the best interests of our clients. The fact that Respondents rightfully questioned and appealed many of the unprecedented aspects of

this consolidated case should not be held against them, particularly when the ALJ later realized her mistake.

Respondent Franchisees should not continue to be punished for the ill-conceived structure of this case nor should they be penalized for exercising appeal rights. It would have been a disservice to our clients to fail to do so.

D. <u>An Opportunity to End the Governmental Waste & Abuse</u>

The governmental waste and abuse caused by this case is open and notorious. It has always been unjustifiable, and it can and should stop now. If not, all Respondents should be entitled to seek remedies and costs for governmental abuse.

In prosecuting this case, the previous General Counsel track of the purpose of the NLRA (to remedy violations and protect employees) in pursuit of a political goal on behalf of the SEIU. This is not why the NLRA exists. In the process of this prosecution, the very real damage to our clients, who have been always been fully willing to remedy the minor wrongs they have been accused of, has been willfully ignored.

This settlement allows the agency to get back on track, and put behind it what will almost certainly be viewed as an embarrassing footnote in its history.

Dated: August 24, 2018

Respectfully Submitted,

By __/s/Louis P. DiLorenzo_____

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CERTIFICATE OF SERVICE

I affirm that, on August 24, 2018, I caused a true and correct copy of the above to be served upon counsel for the parties and/or the parties, by e-mail (where indicated), as follows:

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